

August 17, 2009

By e-mail to [RegComments@fhfa.gov](mailto:RegComments@fhfa.gov)

Alfred M. Pollard, General Counsel  
Federal Housing Finance Agency  
Fourth Floor  
1700 G Street, N.W.  
Washington, DC 20552

Attention: Comments/RIN 2590-AA11

**Re: Reporting of Fraudulent Financial Instruments**

Dear Mr. Pollard:

The Federal Housing Finance Agency (FHFA) has issued a proposed rulemaking with respect to the reporting of fraudulent financial instruments purchased or sold by a regulated entity (the Proposed Rule). The Federal Home Loan Bank of Topeka (the FHLBank) appreciates the opportunity to comment on the Proposed Rule.

The FHLBank has long shared FHFA's views regarding the importance of combating mortgage fraud and agrees that an FHLBank may be exposed to the risk of fraud, particularly when investing in whole mortgage loans. Given the importance of the topic, we believe it is especially critical that the requirements of the agency's fraud reporting and detection regulation be clear to all regulated entities, to maximize the effectiveness of these anti-fraud efforts.

It is in light of the above shared policy goals that we offer the following comments regarding the Proposed Rule.

**I. Scope of Rule**

- **Background:** In 2008, the Office of Federal Housing Enterprise Oversight (OFHEO) issued policy guidance (the OFHEO Guidance) regarding the mortgage fraud programs of Fannie Mae and Freddie Mac (the Enterprises).<sup>1</sup> The definition of "mortgage fraud" in the OFHEO Guidance covered material misstatements and omissions relied upon by an Enterprise to fund or purchase -- or not to fund or purchase -- a single-family or multifamily mortgage, and then provided a

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<sup>1</sup> Examination of Mortgage Fraud Programs, PG-08-001 (January 10, 2008).

nonexhaustive list of specific examples of in-scope mortgage fraud.<sup>2</sup> It is unclear whether the Proposed Rule<sup>3</sup> is intended to expand fraud detection and reporting requirements beyond whole loan mortgage investments as contemplated by the OFHEO Guidance or whether it is intended merely to apply those requirements to the FHLBanks' mortgage purchase programs.

- Comment: Please clarify Sections 1233.1, 1233.3(a)(1) and 1233.4(a) of the Proposed Rule by specifying that their scope does not extend beyond whole loan mortgage investments of the type covered by the OFHEO Guidance. On the other hand, if FHFA does intend a scope broader than whole loan mortgage purchases, please specify which other purchase and sale activities of the FHLBanks would be subject to the fraud reporting requirements.

## II. The Definition of Fraud is Appropriate

- We have no objection to the omission of the traditional element of intent from the definition of fraud in the Proposed Rule. Requiring the FHLBanks to discern intent or conduct "due diligence" might imply a higher duty to investigate than the proposed requirement to report material misstatements. The Proposed Rule is consistent with the governing statute, 12 U.S.C. 4642(a), which requires a regulated entity to submit a report "upon discovery" of fraud or when it "suspects a possible fraud." The Proposed rule properly states: "Possible fraud means that a regulated entity has *a reasonable belief, based upon a review of information available to the regulated entity*, that fraud may be occurring or has occurred." (emphasis supplied) To require any greater duty to investigate would impose an unnecessary burden for no additional benefit. Of course, if we suspect fraudulent intent, we would investigate further, and the Proposed Rule would not impede such investigation. Moreover, since the misstatements must be *material*, the proposed rule will not require reporting minor inadvertent mistakes.

## III. Reliance on Third Parties

- Background: The FHLBank and certain other FHLBanks currently utilize third parties in connection with the quality control process (including mortgage fraud

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<sup>2</sup> Including false information contained in identification and employment documents, false mortgagee or mortgagor identity, fraudulent appraisals, theft of custodial funds, non-remitted payoff funds, misrepresentations of borrower funds, and property flipping where designed to falsely inflate property value.

<sup>3</sup> The Proposed Rule requires reporting of fraud or potential fraud occurring in connection with "a loan, a series of loans or other financial instruments that [a] regulated entity has purchased or sold." Proposed Section 1233.3(a)(1).

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detection) for their mortgage purchase programs, in accordance with the delegation provisions of the Acquired Member Assets regulation.<sup>4</sup> For example, in the Mortgage Partnership Finance program, the Federal Home Loan Bank of Chicago performs quality control on behalf of other FHLBanks participating in the MPF Program. This centralized process is more efficient than if each FHLBank were to perform its own quality control.

- Comment: Please confirm that adequate and appropriate third-party reviews may constitute fraud detection controls sufficient to satisfy a regulated entity's obligations under Section 1233.4 of the Proposed Rule.

Thank you for the opportunity to provide our comments on the Proposed Rule. If you have any questions or would like to discuss any of our comments, please call me at 785-438-6001.

Sincerely,



Andrew J. Jetter

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<sup>4</sup> 12 C.F.R. § 955.5(a).